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05 UNITED STATES DISTRICT COURT  
06 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

07 MAURICE K. SMITH, )  
08 Plaintiff, ) CASE NO. C12-0648-RSL-MAT  
09 v. )  
10 MICHAEL J. ASTRUE, Commissioner ) REPORT AND RECOMMENDATION  
of Social Security, ) RE: SOCIAL SECURITY DISABILITY  
11 Defendant. ) APPEAL  
12 \_\_\_\_\_ )

13 Plaintiff Maurice K. Smith proceeds through counsel in his appeal of a final decision of  
14 the Commissioner of the Social Security Administration (Commissioner). The Commissioner  
15 denied plaintiff's applications for Disability Insurance Benefits (DIB) and Supplemental  
16 Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having  
17 considered the ALJ's decision, the administrative record (AR), and all memoranda of record,  
18 the Court recommends that this matter be REMANDED for further proceedings.

19 **FACTS AND PROCEDURAL HISTORY**

20 Plaintiff was born on XXXX, 1968.<sup>1</sup> He has an eighth grade education and previously  
21 \_\_\_\_\_

22 <sup>1</sup> Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case

01 worked as a mover. (AR 30, 47.)

02 Plaintiff filed an application for DIB and SSI on August 20, 2007, alleging disability  
03 beginning July 31, 2006. (AR 21.) He is insured for DIB through March 31, 2008. (*Id.*)  
04 Plaintiff's application was denied at the initial level and on reconsideration. Plaintiff timely  
05 requested a hearing.

06 On March 23, 2010, ALJ M.J. Adams held a hearing, taking testimony from plaintiff  
07 and a vocational expert. (AR 39-78.) On August 19, 2010, the ALJ issued a decision finding  
08 plaintiff not disabled. (AR 21-31.)

09 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review  
10 on February 17, 2012 (AR 1-6), making the ALJ's decision the final decision of the  
11 Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

## 12 **JURISDICTION**

13 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

## 14 **DISCUSSION**

15 The Commissioner follows a five-step sequential evaluation process for determining  
16 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it  
17 must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had  
18 not engaged in substantial gainful activity since the alleged onset date. At step two, it must be  
19 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's  
20 degenerative disc disease of the lumbar and cervical spine, hepatitis C, a depressive disorder, a  
21 posttraumatic stress disorder, and drug abuse severe. Step three asks whether a claimant's

22 Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 impairments meet or equal a listed impairment. The ALJ found that plaintiff's impairments  
02 did not meet or equal the criteria of a listed impairment.

03 If a claimant's impairments do not meet or equal a listing, the Commissioner must  
04 assess residual functional capacity (RFC) and determine at step four whether the claimant has  
05 demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to lift  
06 and carry twenty pounds occasionally and ten pounds frequently, able to stand and/or walk six  
07 of eight hours, able to sit six out of eight hours, and push and/or pull without restriction other  
08 than as shown for lift/carry. Plaintiff can occasionally climb ramps/stairs, never climb a  
09 ladder/rope/scaffold, frequently balance, and occasionally stoop, kneel, crouch, and crawl. As  
10 to mental RFC, plaintiff can understand, remember, and carry out simple two to three step  
11 instructions required to perform unskilled work. Plaintiff has the average ability to perform  
12 sustained work activities (i.e. can maintain attention, concentration, persistence, and pace in an  
13 ordinary work setting on a regular and continuing basis (i.e. eight hours a day for five days a  
14 week or an equivalent work schedule)) within customary tolerances of employers' rules  
15 regarding sick leave and absences. Plaintiff can make judgments on simple work-related  
16 decisions required to perform unskilled work, and respond appropriately to supervision and  
17 co-workers. Further, plaintiff can deal with changes all within a stable work environment not  
18 dealing with the general public (as in a sales position or where the general public is frequently  
19 encountered as an essential element of the work process); incidental contact with the general  
20 public is not precluded. With that assessment, the ALJ found plaintiff unable to perform his  
21 past relevant work.

22 If a claimant demonstrates an inability to perform past relevant work, the burden shifts

01 to the Commissioner to demonstrate at step five that the claimant retains the capacity to make  
02 an adjustment to work that exists in significant levels in the national economy. With the  
03 assistance of a vocational expert, the ALJ found plaintiff capable of performing other jobs, such  
04 as small products assembler, electrical parts assembler, semi-conductor bonder, and  
05 housekeeping cleaner.

06 This Court's review of the ALJ's decision is limited to whether the decision is in  
07 accordance with the law and the findings supported by substantial evidence in the record as a  
08 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means  
09 more than a scintilla, but less than a preponderance; it means such relevant evidence as a  
10 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881  
11 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which  
12 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278  
13 F.3d 947, 954 (9th Cir. 2002).

14 Plaintiff assigns error to the ALJ's determination that he did not have a severe right  
15 upper extremity impairment. He also argues the ALJ did not give sufficient reasons for  
16 rejecting the opinions of examining psychologists Dr. Maria Bakht and Dr. Daniel Neims and  
17 did not properly consider the opinion of the state agency reviewing psychologist. He requests  
18 remand for further administrative proceedings. The Commissioner argues that the ALJ's  
19 decision is supported by substantial evidence and should be affirmed.

#### 20 Step Two

21 At step two, a claimant must make a threshold showing that his medically determinable  
22 impairments significantly limit his ability to perform basic work activities. *See Bowen v.*

01 *Yuckert*, 482 U.S. 137, 145 (1987) and 20 C.F.R. §§ 404.1520(c), 416.920(c). “Basic work  
02 activities” refers to “the abilities and aptitudes necessary to do most jobs.” 20 C.F.R. §§  
03 404.1521(b), 416.921(b). “An impairment or combination of impairments can be found ‘not  
04 severe’ only if the evidence establishes a slight abnormality that has ‘no more than a minimal  
05 effect on an individual’s ability to work.’” *See Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir.  
06 1996 (quoting Social Security Ruling (SSR) 85-28). “[T]he step two inquiry is a de minimis  
07 screening device to dispose of groundless claims.” *Id.* (citing *Bowen*, 482 U.S. at 153-54).

08 The ALJ found plaintiff’s degenerative disc disease of the lumbar and cervical spine  
09 severe at step two. The ALJ ruled out any other physical impairment, finding:

10 There is some mention of right wrist fractures and brief mention of “knee pain”.  
11 Imaging of the left knee showed moderate osteoarthritis of the patellofemoral  
12 compartment. Imaging of the right knee showed no definite abnormality and  
13 only minimal thinning of the patellar cartilage. Despite the claimant’s  
testimony of ongoing symptoms, there is only sporadic mention of these  
symptoms in the record. Therefore, given the meager development and scant  
objective findings, the left knee and right wrist are found to be non-severe.

14 (AR 23-24, citations to administrative record omitted.)

15 Plaintiff contends the ALJ failed to discuss any medical evidence relating to a right  
16 upper extremity impairment, noting a history of multiple injuries to his right hand, continuing  
17 pain and diffuse tenderness, with decreased sensation and a weakened grip. (*See, e.g.*, AR  
18 624, 694, 699, 702.) Defendant argues the ALJ is not required to specifically identify and  
19 discuss every piece of evidence in the record. *Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th  
20 Cir. 1994) (holding the ALJ need not discuss all evidence presented to him; rather, he must  
21 explain why “significant probative evidence has been rejected.”) Defendant contends plaintiff  
22 fails to demonstrate error at step two because no specific limitations from a right upper

01 extremity impairment have been identified. *Carmickle v. Comm'r*, 533 F.3d 115, 1165-66 (9th  
02 Cir. 2008) (holding the mere existence of an impairment is insufficient proof of a disability).  
03 Defendant further argues that error at step two, if any, would be harmless because the ALJ  
04 found other severe impairments at step two and continued the sequential analysis through step  
05 five.

06 The Court, however, agrees with plaintiff that the ALJ's consideration of the existence  
07 of a right upper extremity impairment was not legally sufficient. The only reference in the  
08 decision in this regard is the ALJ's comment that "there is some mention of right wrist  
09 fractures." (AR 23.) While the failure to list an impairment as severe at step two can be  
10 found harmless if any relevant limitations were nevertheless considered at step four, *Lewis v.*  
11 *Astrue*, 498 F.3d 909, 911 (9th Cir. 2007), a review of the decision does not permit this  
12 inference.

13 A determination that an impairment is not severe requires "a careful evaluation of the  
14 medical findings that describe the impairment(s) . . . and an informed judgment about the  
15 limitations and restrictions the impairment(s) and related symptom(s) impose on the  
16 individual's ability to do basic work activities." SSR 96-3p \*2 (citing SSR 96-7p). An ALJ is  
17 also required to consider the "combined effect" of an individual's impairments in considering  
18 severity. *Smolen*, 80 F.3d at 1290.

19 In the context of this legal framework, the ALJ's step two consideration of a right upper  
20 extremity impairment falls short. Plaintiff testified about injuries to his right hand and  
21 resulting problems and limitations, and the vocational expert testified that limitations on the use  
22 of the hand or fingering would eliminate some of the step five jobs. (AR 53-55, 74.) While

01 the ALJ need not discuss each piece of evidence in the record, he “must explain why  
02 ‘significant probative evidence has been rejected.’” *Vincent*, 739 F.2d at 1394-95 (quoting  
03 *Cotter v. Harris*, 642 F.2d 700, 706 (3d Cir. 1981)). Nor does the record show the ALJ  
04 considered the impact of a right upper extremity impairment at a subsequent step of the  
05 sequential evaluation. *See Lewis*, 498 F.3d at 911. The matter should be remanded to allow  
06 the ALJ to evaluate the presence of a right upper extremity impairment at step two, and to  
07 further consider any resulting limitations in plaintiff’s RFC.

#### 08 Medical Opinions

09 In general, more weight should be given to the opinion of a treating physician than to a  
10 non-treating physician, and more weight to the opinion of an examining physician than to a  
11 non-examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not  
12 contradicted by another physician, a treating or examining physician’s opinion may be rejected  
13 only for “‘clear and convincing’” reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391,  
14 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician’s opinion may  
15 not be rejected without “‘specific and legitimate reasons’ supported by substantial evidence in  
16 the record for so doing.” *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir.  
17 1983)). The ALJ may reject physicians’ opinions “by setting out a detailed and thorough  
18 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and  
19 making findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*,  
20 881 F.2d at 751). Rather than merely stating his conclusions, the ALJ “must set forth his own  
21 interpretations and explain why they, rather than the doctors’, are correct.” *Id.* (citing  
22 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

01 A. Maria Bakht, Psy.D.

02 Dr. Bakht, a psychologist,<sup>2</sup> conducted a consultative examination of plaintiff on  
03 October 23, 2008. (AR 491-97.) The ALJ accepted Dr. Bakht's opinion that plaintiff  
04 demonstrated a slow pace but adequate concentration, indicating that "such evidence is  
05 accounted for in finding that the claimant can perform unskilled work with some degree of  
06 social interaction." (AR 27.)

07 With regard to other opinions expressed in Dr. Bakht's report, the ALJ found as follows:

08 Consultative psychologist, Maria Bakht, Psy.D., opined that the claimant can  
09 perform very simple and concrete tasks within a highly structured environment  
10 with supervision. The psychologist also noted that the claimant may have some  
11 difficulty getting along with others who may perceive him as detached. The  
12 psychologist further indicated that if the claimant feels overwhelmed in the  
13 workplace he is unlikely to complete tasks and that he may leave the job if he  
14 feels too stressed. Dr. Bakht's opinion is not found to be persuasive as the  
15 psychologist relied in part on the claimant's self-report of symptoms, which is  
16 replete with credibility concerns. As discussed above, the claimant did not  
17 provide consistent reports of his drug use and periods of sobriety, including his  
18 account to Dr. Bakht. Further the psychologist did not review any medical  
19 records. Thus, the psychologist's opinion is given less weight.

20 (AR 29.)

21 Plaintiff raises several grounds for disputing the ALJ's evaluation of Dr. Bakht's  
22 opinions. Plaintiff argues it was inappropriate for the ALJ to give less weight to Dr. Bakht's  
23 opinion because she was not provided with medical records, and posits the doctor's reliance on  
24 her own clinical observations as much as plaintiff's subjective complaints.

25 Plaintiff does not assign error to the ALJ's finding that plaintiff's testimony about his

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26 <sup>2</sup> The record does not show that Dr. Bakht has a M.D. degree, as plaintiff indicates. (Dkt. 14 at  
27 8, 12.)



01 subjective symptoms was not entirely credible. (AR 26-28.) As the Commissioner argues,  
02 and plaintiff acknowledges, it is not improper for an ALJ to reject a medical opinion largely  
03 based on a claimant's discredited subjective complaints. *Tommasetti v. Astrue*, 533 F.3d 1035,  
04 1041 (9th Cir. 2008). Likewise, it was not inappropriate for the ALJ to rely on the fact that Dr.  
05 Bakht had not reviewed medical records, as the extent to which a medical source is familiar  
06 with the other information in the case record is a relevant factor to be considered, and the  
07 regulations do not mitigate this factor because the records were not provided to the consultant  
08 by the Agency. 20 C.F.R. §§ 404.1527(c)(6), 416.927(c)(6).

09       However, the Court finds it necessary to require the ALJ to revisit the evaluation of Dr.  
10 Bakht's opinion for a different reason. It is not clear which of Dr. Bakht's opinions the ALJ  
11 found deserving of less weight. While the ALJ cited the doctor's opinions regarding plaintiff's  
12 ability to perform very simple and concrete tasks within a highly structured environment with  
13 supervision, his difficulty getting along with others who may perceive him as detached, and his  
14 likely inability to complete tasks and to leave the job if feeling too overwhelmed and stressed,  
15 the ALJ found only that Dr. Bakht's opinion (in the singular) was not persuasive. (AR 29.) It  
16 is not clear if the ALJ rejected all of the opinions listed, or accounted for some of them in the  
17 RFC (as was done with Dr. Bakht's opinion regarding plaintiff's slow pace). On remand, the  
18 ALJ should specify which opinions set forth in Dr. Bakht's report are given weight and  
19 included in the RFC finding, and which are not given weight, with legally sufficient reasons  
20 therefor.

21 B. Daniel Neims, Psy.D.

22 Dr. Neims evaluated plaintiff in 2007 and 2008 at the referral of the State. (AR

01 527-46.) The ALJ considered Dr. Neims' opinions regarding plaintiff's cognitive and social  
02 limitations:

03 On forms completed for Washington State's Department of Social and Health  
04 Services (DSHS), examining psychologist Daniel Neims, Psy.D., checked boxes  
05 indicating marked to severe cognitive and social limitations. Neither form is  
06 found to be persuasive due to the psychologist's heavy reliance on the  
claimant's subjective complaints and inconsistent statements. For instance, on  
exam in 2008, the claimant told Dr. Neims that he had 14 months of sobriety  
despite multiple drug relapses. I accord little weight to these forms.

07 (AR 29, citations to administrative record omitted.)

08 Plaintiff argues these reasons were not specific and legitimate, disputing the ALJ's  
09 finding that Dr. Neims relied heavily on plaintiff's subjective complaints rather than his own  
10 professional clinical observations. The Commissioner argues that the ALJ's contrary  
11 interpretation of Dr. Neims' report was rational and supported by substantial evidence. *See*  
12 *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982) ("In reaching his findings, the law  
13 judge is entitled to draw inferences logically flowing from the evidence.") (cited sources  
14 omitted).

15 The Court does not find the ALJ's evaluation of Dr. Neims' opinions legally sufficient.  
16 While the factors cited by the ALJ are appropriate bases for evaluating the opinion of an  
17 examining medical source, *see Morgan v. Comm'r Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th  
18 Cir. 1999) (ALJ may reject a treating physician's opinion if it is based "to a large extent" on a  
19 claimant's self-reports that have been properly discounted as incredible) (quoting *Fair v.*  
20 *Bowen*, 885 F.2d 597, 605 (9th Cir. 1989)), *Verduzco v. Apfel*, 188 F.3d 1087, 1090 (9th Cir.  
21 1999) (inconsistent statements regarding alcohol use may be considered as a reason to reject a  
22 claimant's testimony), the ALJ mischaracterized Dr. Neims' reports as check-the-box forms,

01 *see Molina v. Astrue*, 674 F.3d 1103, 1111 (9th Cir. 2012) (ALJ may ““permissibly reject[ ] . . .  
02 check-off reports that [do] not contain any explanation of the bases of their conclusions.””)  
03 (quoting *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996)). Dr. Neims summarized the  
04 relevant medical history based on a review of the medical records, and conducted a clinical  
05 interview, reporting his findings and observations in the evaluation report. On remand, the  
06 ALJ should evaluate Dr. Neims’ report in full.

07 C. State Agency Consultant – Michael Regets, Ph.D.

08 The ALJ accorded “great weight” to the state agency reviewing medical consultant, Dr.  
09 Regets:

10 As to mental residual functional capacity, the State agency’s reviewing medical  
11 consultant, Dr. Regets, opined that the claimant can perform simple tasks  
12 involving superficial public contact. Dr Regets’ medical opinion is consistent  
13 with that [sic] the claimant’s activities of daily living and other reported  
14 activities, including driving, shopping, and doing household chores. Dr.  
15 Regets medical opinion is also consistent with the claimant’s performance on  
16 exam. [Citing to Dr. Bakht’s examination, AR 491-97.] Therefore, great  
17 weight is accorded.

18 (AR 29, citations to administrative record omitted.)

19 Plaintiff argues the ALJ overlooked certain portions of Dr. Regets’ opinions that  
20 corroborated disability. In particular, plaintiff notes Dr. Regets’ opinion that plaintiff’s  
21 “overall condition would restrict him from maintaining/sustaining nrml workday/workweek on  
22 consistent basis” (AR 501), and Dr. Regets’ assessment of moderate limitations in plaintiff’s  
23 ability to work in coordination with or proximity to others without being distracted (AR 500).  
24 Plaintiff also notes other moderate limitations assessed by Dr. Regets in the Summary  
25 Conclusions portion of the assessment, such as the ability to complete a normal workday

01 without interruptions from psychologically based symptoms and to perform at a consistent pace  
02 without an unreasonable number and length of rest periods, to sustain an ordinary routine  
03 without special supervision, or to accept instructions and respond appropriately to criticism  
04 from supervisors. (AR 499-500.)

05 The Commissioner argues Dr. Regets' opinions read in context show that he took into  
06 consideration not only plaintiff's mental impairments, but also physical impairments beyond  
07 Dr. Regets' area of expertise. The Commissioner also notes that most of the moderate  
08 limitations assessed by Dr. Regets are in the checkbox portion of the report.

09 Again, while the ALJ need not discuss every piece of evidence in the record, he "must  
10 explain why 'significant probative evidence has been rejected.'" *Vincent*, 739 F.2d at 1394-95  
11 (quoting *Cotter*, 642 F.2d at 706). State agency psychological consultants are highly qualified  
12 experts in the evaluation of the medical issues in disability claims under the Act. SSR 96-6p.  
13 The Court agrees that the ALJ did not address some of Dr. Regets' opinions which, if credited,  
14 could have affected plaintiff's RFC. The ALJ is not required to adopt the opinion of any  
15 particular medical source, but is obligated to "set forth his own interpretations and explain why  
16 they, rather than the doctors', are correct." *Reddick*, 157 F.3d at 725. On remand, the ALJ  
17 should more fully explain the evaluation of Dr. Regets' opinions.

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**CONCLUSION**

For the reasons set forth above, this matter should be REMANDED for further proceedings.

DATED this 25th day of October, 2012.

A handwritten signature in black ink, appearing to read 'Mary Alice Theiler', written over a horizontal line.

Mary Alice Theiler  
United States Magistrate Judge